BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television	)	MM Docket No. 92-265

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SUMMARY

NRTC commends the Commission for the comprehensive regulatory approach adopted in the First Report and Order in this proceeding. The Commission's decision to prohibit discrimination in the provision of video programming is essential to the development of a competitive video distribution marketplace. NRTC submits this Petition for Reconsideration for the specific purpose of addressing three limited issues.

First, the Commission concluded that the Cable Act does not grant the Commission the authority to assess damages against a programmer or a cable operator for a violation of

Secondly, the Commission misapplied Section 628(c)(2)(C) of the Cable Act regarding the provision of programming in areas not served by a cable operator. This section prohibits any practice, understanding, arrangement or activity by any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor that prevents an MVPD from obtaining programming from a vertically-integrated program vendor for distribution to persons in areas not served by a cable operator. The Commission's rule implementing this section, however, restricts the scope of this section solely to conduct by a "cable operator."

Lastly, the Commission pre-judged in this proceeding questions regarding the satellite carriers' claimed cost "justification" for their discrimination against Home

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Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	**MM Docket No. 92-265**
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

To: The Commission

PETITION FOR RECONSIDERATION
OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

Pursuant to Section 1.106 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"), the National Rural Telecommunications Cooperative ("NRTC") is pleased to submit this Petition for Reconsideration of the First Report and Order adopted in the above-captioned proceeding on April 1, 1993.1/

1/ 58 Fed. Reg. 27658 (May 11, 1993).

I. BACKGROUND

1. As described in detail in NRTC's Comments and Reply Comments submitted in this proceeding on January 25 and February 16, 1993, respectively, NRTC is a non-profit corporation, owned and controlled by 521 rural electric cooperatives and 231 rural telephone systems located throughout 49 states. NRTC's mission is to assist member companies in meeting the telecommunications needs of the 60 million American consumers who live in rural areas. Through the use of satellite distribution technology, NRTC is committed to extending the benefits of information, education and entertainment programming to rural America on an affordable basis, in an easy and convenient manner -- just like cable television services are provided in urban America.

2. Currently, using C-band technology, NRTC and its members provide various packages of satellite-delivered programming, called "Rural TV®," to more than 75,000 Home Satellite Dish ("HSD") subscribers. In its C-band distribution business, NRTC provides the same administrative marketing and consumer support to programmers as does a cable operator using hard-wired cable.

3. NRTC also has entered into an Agreement with Hughes Communications Galaxy, Inc. ("Hughes"), to provide high-powered Direct Broadcast Satellite ("DBS") services to subscribers across the country. Under the Agreement, NRTC, its members and affiliated companies purchased satellite capacity and other necessary services to market and distribute 20 channels of popular cable and broadcast television programming to rural households equipped with 18-inch DBS satellite receiving antennas. The service is expected to be offered in April 1994. When the system is fully deployed, more than 100 channels of movie, sports, networks, cable and other entertainment and information services will be available throughout the continental United States by direct-to-home satellite.

4. NRTC and its members, primarily consumer cooperatives, were actively involved with Congress in the development of the "Program Access" provisions now contained in Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, (Pub. L. No. 102-385, 106 Stat. 1460, (1992)) (the "Cable Act"). NRTC also participated extensively in the instant Commission proceeding to implement these provisions into the Commission's Rules and Regulations.

5. NRTC commends the Commission for the detailed analysis and comprehensive regulatory approach adopted in the First Report and Order. Obviously, the Commission shared Congressional concerns regarding the importance of prohibiting discrimination by cable programmers against distributors using alternative delivery technologies, such as HSD and DBS. NRTC submits this Petition for Reconsideration for the limited purpose of addressing three specific issues contained in the First Report and Order.

II. DISCUSSION

A. The Commission Should Reserve the Right to Award Damages in Appropriate Cases for Violation of the Program Access Requirements.

6. The Commission recognized in the First Report and Order that the Congress provided it with broad authority to order "appropriate remedies" for violations of the nondiscrimination requirements of Section 628, including the power to establish prices, terms and conditions of sale of programming to the aggrieved multichannel video programming distributor ("MVPD"). These remedies are in addition to and not in lieu of the remedies available to the Commission under Title V or any other provision of the Communications

Act.[2/] The Commission indicated, however, that in most cases the appropriate remedy for a Program Access violation will be to order the programming vendor to revise its contract or to offer the complainant a price or contract term in accordance with the Commission's findings.[3/]

7. The Commission expressed its belief in the First Report and Order that the Cable Act does not grant the Commission the authority to assess damages against a programmer or a cable operator for violation of Section 628. NRTC submits that the Commission has unnecessarily restricted its authority under the Cable Act to order appropriate remedies, including damages, for violation of the Program Access rules.

8. Damages are traditionally regarded as an "appropriate remedy" imposed by the Commission for violation of its nondiscrimination requirements. For instance, Section 202 of the Communications Act of 1934, as amended, prohibits certain unjust or unreasonable discrimination by common carriers. Section 206 of the Act, as well as the

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2/ Section 628(e)(1) and (e)(2).

3/ ¶¶ 81, 134.

corresponding provision of the Commission's rules,[4/] provide that a common carrier is liable to any person injured as a result of unjust or unreasonable discrimination by a common

will be an inadequate deterrent, and they will not benefit the video distribution market or make the aggrieved MVPD whole.

10. Without the possibility of an appropriate award of damages, program vendors have no incentive to discontinue their discriminatory pricing practices. Rather, they will be motivated to prolong complaint proceedings, contrary to the Commission's stated intention to establish expedited enforcement procedures. The Program Access rules will lack the regulatory "teeth" necessary to combat this long-standing problem.

11. NRTC has been fighting on behalf of rural consumers for fair access to programming for over six years. During that time, NRTC has participated in numerous proceedings before the Commission and the United States Congress. Last October, Congress passed a law designed to terminate these discriminatory practices. In adopting rules implementing the new law, the Commission has provided an ample grace period to the programmers to cease their

discrimination and to bring their existing agreements into compliance with the new rules.[5/]

12. Some programmers already have indicated to NRTC that they do not intend to comply with the Commission's new requirements. NRTC submits that there is no public policy rationale at this point to allow them to continue these discriminatory practices with impunity. They must be subject to damages in appropriate cases.

13. In NRTC's case, some programmers routinely charge NRTC **700%** to **800%** more for programming than a similarly situated cable operator. Typically, NRTC has been required to pay on average some **460%** more than small cable companies are required to pay for the identical programming. The pricing disparity between NRTC and small cable companies for NRTC's 18 channel Basic Plus Service, for example, has ranged from a low of **233%** to a high of **780%**. In dollars and cents, this means that NRTC has been required to pay more than **$10.00** at wholesale for 18 channels while a small cable

subscribers, NRTC's damages for this pricing discrimination will continue to run more than **$150,000** per month. This type of discrimination is unfair to rural consumers. It thwarts competition. And it is now contrary to the Cable Act.

14. Additionally, the prosecution of complaint cases at the Commission may require an MVPD to expend considerable funds for attorney fees. As in common carrier discrimination cases under Title II of the Communications Act, these fees and other necessary expenses should be recoverable by the successful complainant in Program Access discrimination cases. 47 U.S.C. 206.

15. Programmers should be encouraged -- not discouraged -- by the Commission's regulatory structure to terminate these types of discriminatory pricing practices. The possibility of an award of damages and counsel fees will provide the appropriate incentive.

16. NRTC urges the Commission to reconsider its decision not to issue an award of damages and attorney fees in appropriate cases for violation of the Program Access requirements. As in common carrier discrimination cases, damages should be recoverable for a period of two years from

the time the cause of action accrues.[6/] Alternatively, the Commission at least should award damages from the date the Complaint is filed with the Commission.

B. The Commission Should Not Unduly Limit the Scope of the Prohibition Contained in Section 628(c)(2)(C) of the Cable Act Regarding Practices that Prevent an MVPD from Obtaining Programming in Areas Not Served by a Cable Operator.

17. Section 628(b) of the Cable Act contains broad prohibitions making it unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast

> cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section.

18. In its First Report and Order, however, the Commission restricted the application of Section 628(c)(2)(C) to "cable operators." Section 76.102(c)(1) of the Commission's rules now states that:

> **Unserved Areas.** No cable operator shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992. (Emphasis added).

19. Congress did not intend Section 628(c)(2)(C) to apply only to conduct by a cable operator. The express purpose of Section 628 is to increase competition, diversity and the availability of programming to persons in rural and other areas not currently able to receive such programming. 47 U.S.C. 548(a). Activities by entities who are subject to

the prohibitions of the Cable Act, but who are not cable operators, could thwart this Congressional purpose. By enacting the broad language of Sections 628(b) and (c)(2)(C), Congress expressed its concern regarding conduct by any cable operator, satellite cable programming vendor in

Clearly, Section 628(c)(2)(C) is not limited in scope solely to conduct by cable operators.

21. Restricting the application of Section 628(c)(2)(C) only to conduct by cable operators will create a massive regulatory "loophole." It will allow exclusive contracts and other practices, understandings, arrangements and activities by vertically-integrated satellite cable programming vendors and by satellite broadcast programming vendors that will block other MVPDs from obtaining programming. This will stifle competition and diversity in the multichannel video programming market. The Commission should not allow programming vendors to select such "favored" MVPDs to the exclusion of others. This type of activity represents a "bottleneck" restricting competition and diversity in the rural markets. It is specifically prohibited by Section 628(c)(2)(C) but would be permissible under Section 76.1002(c)(1) of the Commission's new rules, because it does not involve a "cable operator."

22. For example, the Department of Justice and the offices of various state Attorneys General announced yesterday their settlement of antitrust charges against

several of the nation's largest cable companies.7/

According to Maryland Attorney General J. Joseph Curran, a company called "Primestar" was formed by these cable companies to acquire transmission rights on a satellite that would permit technologically advanced direct satellite-to-home service. After acquiring these rights, Curran said the cable companies conspired to block development of this new technology as a competitive force by offering only programming that did not compete with cable.

[redacted]

C. The Commission Should Not Pre-Judge Questions Regarding the Cost "Justification" for Satellite Broadcast Programming Vendors' Discriminatory Prices Against Home Satellite Dish Distributors.

25. The Commission's First Report and Order contains a number of statements regarding the apparent costs involved

[redacted]

(Paragraph 100). The Commission indicated that vendors of such programming are constrained to set their prices below a potential competitor's cost of obtaining the signal directly from the satellite. If the vendor's price exceeds this cost, the potential competitor has an incentive to obtain the signal directly rather than to purchase it from the vendor. (Footnote 164).

27. NRTC urges the Commission not to pre-judge these and other related issues concerning the alleged costs incurred by satellite broadcast programming vendors ("satellite carriers") in providing service to HSD distributors. The fact of the matter is that the satellite carriers' blatant price discrimination against NRTC as an HSD distributor -- requiring payment of as much as **800%** more than cable rates -- cannot be justified by any costs incurred by the carriers at the wholesale level.

28. Satellite carriers neither originate nor own these signals. They merely re-transmit them for HSD, cable, MMDS and SMATV distribution. The satellite carrier uplinks the same signal in the same scrambled format to the same satellite transponder for the HSD, cable, MMDS and SMATV wholesale distribution markets. From the satellite transponder, the scrambled signal is "handed-off" or down-

linked either to cable, SMATV or MMDS "head-ends" or to the premises of the HSD subscriber. Costs of satellite carriage to this point are exactly identical in all cases.

29. For the cable, MMDS and SMATV distributor, the satellite carrier directly authorizes descrambling of the satellite delivered signal to occur at the operator's head end. This authorization is transmitted from the carrier's uplink facility.

30. HSD distribution does require the satellite carrier to obtain a "tier bit" at the DBS Authorization Center. The cost of the tier bit is now $3,575 per month and one or more satellite services can be included on a single tier bit. Additionally, the satellite carrier is required to pay for an activation data link between the DBS Authorization Center and the satellite carrier's uplink facility at approximately $950 per month for communication and equipment costs.8/ These are the only costs -- a DBS Authorization Center tier bit and an activation data link -- that are conceivably distinguishable in the wholesale delivery of the scrambled signal to HSD distributors versus

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8/ Communication and equipment costs consist of a $715 monthly fee by General Instrument for satellite datalink capacity plus $234 per month for equipment costs ($11,000 amortized over 5 years at 10%).

MMDS, SMATV and cable distributors, and they are de minimis when evaluated on a per subscriber basis.

31. Moreover, similar types of authorization and activation costs are also incurred by programmers in providing service to cable, SMATV and MMDS operators. These types of costs are already included in cable, SMATV and MMDS wholesale programming rates. It is grossly inappropriate, therefore, for a programmer simply to add the HSD tier bit and activation data link costs to their wholesale cable rates when "justifying" rates to an HSD distributor. Costs used by carriers to "justify" rates to HSD distributors must be incurred by the carriers in serving HSD distributors.

32. The adequacy of a particular satellite carrier's claimed cost "justification" for discrimination against a particular HSD distributor must be resolved case by case. Different carriers incur different costs in serving different distributors. Each carrier must be required to provide, as an affirmative defense to a complaint of discrimination, specific evidence of costs incurred by that

33. NRTC disagrees strongly with the Commission's apparent conclusion in this proceeding that service to HSD distributors is more costly than service to others using different delivery technologies. NRTC urges the Commission to reconsider this issue and other related costing matters.9/ NRTC further urges the Commission not to foreclose in this proceeding a full explanation in subsequent complaint proceedings of the satellite carriers' claimed cost "justification" for their discriminatory prices.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Federal Communications Commission to act in accordance with these

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9/ For instance, the so-called "artificial ceiling" on program pricing by satellite carriers is statutorily irrelevant. Congress never intended to force distributors or others to become uplinkers in order to obtain fair pricing from satellite carriers. Moreover, any such "ceiling" is dependent upon numerous factors, including the number of subscribers served in any particular case. None of these types of issues can be resolved in the instant proceeding.

requests and to reconsider its First Report and Order in this proceeding as described above.

Respectfully submitted,

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